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# THE DUTY TO CONSULT ON WILDLIFE MATTERS IN OVERLAPPING NORTHERN LAND CLAIMS AGREEMENTS

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*by Daniel Dylan\**

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*“From time immemorial, Inuit survival in a harsh and unforgiving arctic environment has depended upon nomadic hunting activities. It is this activity that today defines the Inuit’s social and cultural identity as a people. In the 21st century, Inuit language, art, traditional clothing, and diet continue to reflect the profound relationship of a people to the land, and to all the creatures of air, sea and land that have given life and meaning to Inuit for centuries. The protection of an individual’s right of harvest, in the Inuit perspective, remains fundamental to the preservation of Inuit culture.”*<sup>1</sup>

## INTRODUCTION

Since *Haida Nation v. British Columbia (Minister of Forests)* was decided in 2004, the common law duty to consult Aboriginal peoples when a government action or decision may affect an Aboriginal or treaty right has been incrementally, but steadily, developing in Canadian jurisprudence.<sup>2</sup> We have learned and witnessed that the duty to consult exists on a spectrum, with the more significant interests or rights at stake attracting a higher level of incumbency on governments to meet that duty and, in the spirit of reconciliation, accommodate those rights or interests, than when lesser ones are at stake.<sup>3</sup> Yet, most of this jurisprudence, and that respecting the “honour of the Crown,” has emerged in cases involving First Nations peoples, Canada’s largest constitutionally protected Aboriginal peoples and little, by comparison, in recent years at least, has emerged from cases involving the Metis or Inuit peoples, Canada’s two other constitutionally protected Aboriginal peoples.<sup>4</sup> This is not to say, however, that the common law duty to consult is absent in matters affecting Metis and Inuit; but rather, that the duty to consult has manifested in inchoate and “murkier” forms, and, less often, particularly in the context of jurisdictions created by land claims agreements, such as Nunavut.<sup>5</sup> There have only been a handful of cases in Nunavut addressing the duty to consult.<sup>6</sup> Moreover, it seems

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<sup>1</sup> *Nunavut Tunngavik Inc v Canada (Attorney General)*, 2003 NUCJ 1 at para 4 (per Kilpatrick J).

<sup>2</sup> See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74 [*Taku River Tlingit First Nation*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree First Nation*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto Alcan*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon/Carmacks First Nation*]; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot’in Nation*]; see also Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009).

<sup>3</sup> *Haida Nation*, *supra* note 2; *Little Salmon/Carmacks First Nation*, *supra* note 2; *Rio Tinto Alcan*, *supra* note 2 at para 32 (“... accommodate those interests in the spirit of reconciliation.”).

<sup>4</sup> See e.g. *Daniels v Canada*, 2013 FC 6; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14.

<sup>5</sup> See e.g. Michael McClurg, “A Pragmatic Approach: The Nunavut Wildlife Management Board and the Duty to Operationalize Consultation” (2010) 9 *Indigenous LJ* 77.

<sup>6</sup> See e.g. *Qikiqtani Inuit Assn. v Canada*, 2010 NUCJ 12 at para 19 [*Qikiqtani Inuit Assn*] (“...the duty to consult will arise when the Crown has knowledge of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it.... The government’s duty to consult and accommodate arises from its obligation to deal honourably with Aboriginal people. The duty extends not only to the process of treaty making, but also of treaty interpretation. The duty to consult and accommodate does not come to an end when a treaty is settled.” [emphasis added]).

there are relatively few instances or provisions in these land claims agreements by which the common law duty to consult would seemingly be more than *prima facie* triggered.<sup>7</sup> There is no “Crown in right of Nunavut”, and the *Nunavut Land Claims Agreement* (NLCA) is considered to be “final,” i.e., that no other Inuit rights or interests exist following its execution. Such an absence in the jurisprudence is indeed a curious result.

Nevertheless, the conclusion of several land claims agreements—or modern day “treaties”—with Canada’s Inuit and Cree peoples, such as the *Nunavik Inuit Land Claims Agreement*,<sup>8</sup> and the *James Bay Cree and Northern Quebec Land Claims Agreement*,<sup>9</sup> the *Agreement Between The Crees of Eeyou Istchee And Her Majesty The Queen*,<sup>10</sup> and the *Nunavut Land Claims Agreement*,<sup>11</sup> all of which, in effect, settled all claims against the Government of Canada by these Aboriginal peoples by exchanging title to lands for the guarantee of certain rights and benefits from the Government of Canada,<sup>12</sup> may only partly explain this result in the sense that these treaties are analogous to contracts, albeit solemn ones, in which only those matters that exist and are articulated within the four corners of the

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<sup>7</sup> There are three requirements for a duty to consult trigger to take place: “(1) There is a proposed Crown conduct; (2) the proposed Crown conduct could potentially have an adverse impact on potential or established Aboriginal or treaty rights; and (3) there are potential or established Aboriginal or treaty rights in the area.” See Aboriginal Affairs and Northern Development Canada, “Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to Consult” (March 2011), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>>.

<sup>8</sup> “Agreement Between Nunavik Inuit and Her Majesty the Queen in Right of Canada” (1 December 2006), online: Indigenous and Northern Affairs Canada <[http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ldc\\_ccl\\_fagr\\_nk\\_lca\\_1309284365020\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ldc_ccl_fagr_nk_lca_1309284365020_eng.pdf)>, colloquially known as the “Nunavik Inuit Land Claim Agreement” [NILCA]. See also the *Nunavut Inuit Land Claims Agreement Act*, SC 2008, c 2 (in which NILCA is given legal force and effect).

<sup>9</sup> “The James Bay and Northern Quebec Agreement” (November 1975), online: <<http://www.gcc.ca/pdf/LEG000000006.pdf>> [JBNQA]. See also the *Cree-Naskapi (of Quebec) Act*, SC 1984, c 18. (in which certain provisions of the JBNQA are given legal force and effect).

<sup>10</sup> “Agreement Between the Crees of Eeyou Istchee and Her Majesty the Queen in Right of Canada Concerning the Eeyou Marine Region”, online: Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1320437343375/1320437512985>> [Eeyou Agreement]. See also the *Eeyou Marine Region Land Claims Agreement Act*, SC 2011, c 20 (in which the Eeyou Agreement is given legal force and effect).

<sup>11</sup> “Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada” (25 May 1993), online: Indigenous and Northern Affairs Canada <[http://www.collectionscanada.gc.ca/webarchives/20071124140800/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20071124140800/http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf)>, colloquially known as the “Nunavut Land Claims Agreement” [NLCA]. See also the *Nunavut Land Claims Agreement Act*, SC 1993, c 29 (in which the NLCA is given legal force and effect).

<sup>12</sup> See Aboriginal Affairs and Northern Development Canada, “Land Claims”, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289>>; see also Jennifer E. Dalton, “Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?” (2006) 22 *Windsor Rev Legal Soc Issues* 29.

“contract” are properly justiciable, and thus, there has simply not been much to litigate and adjudicate.<sup>13</sup> But this is not a sufficient answer.<sup>14</sup>

Another factor that might explain this result is perhaps the uncertainty as to how the duty may apply to beneficiaries of land claims agreements.<sup>15</sup> To further complicate matters, “the ambit of the Crown’ has largely been absent from the duty to consult jurisprudence.”<sup>16</sup> In other words, it is not always clear who is “the Crown.”

Unfortunately, there is little jurisprudence or academic scholarship that clearly articulates whether the common law duty to consult remains extant on governments in matters that affect Aboriginal peoples in land claim agreement areas or jurisdictions, save

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<sup>13</sup> *R v Badger*, [1996], 1 SCR 771 at para 76; *Little Salmon/Carmacks First Nation*, *supra* note 2 at para 5 (“The territorial government responds that no consultation was required. The LSCFN Treaty, it says, is a complete code. The treaty refers to consultation in over 60 different places but a land grant application is not one of them. Where not specifically included, the duty to consult, the government says, is excluded.”).

<sup>14</sup> Justice Binnie held in *Little Salmon/Carmacks First Nation*, *supra* note 2 at paras 10, 12:

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act*, 1982. The modern treaties ... attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still ... the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.... The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties.... The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Quebec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests.

<sup>15</sup> See e.g. *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763.

<sup>16</sup> McClurg, *supra* note 5, citing Michelle Maniago, “A Matter of Hats: Understanding the Ambit of the Crown and the Duty to Consult” (2007) [unpublished, archived at Osgoode Hall Law School (Aboriginal Intensive Program)] [Maniago].

for *Beckman v. Little Salmon/Carmacks First Nation* which holds that it generally does.<sup>17</sup> While *Delgamuukw v. British Columbia*<sup>18</sup> and *R. v. Kapp*,<sup>19</sup> among other seminal cases, hold and reiterate the principle that the common law duty to consult is a *constitutional* one, few judicial decisions demonstrate or apply a legal analysis illustrating how the common law duty is to be fulfilled in jurisdictions such as Nunavut. Litigation in respect of the NLCA, for example, now focuses mostly on implementation issues.<sup>20</sup> Again, this is not to say the common law duty to consult is non-existent in Nunavut.<sup>21</sup>

While *Little Salmon/Carmacks First Nation*, a decision involving a Yukon First Nation, holds that the duty to consult is extant on governments in a modern treaty context, little guidance can be gained from the decision as to whether federally created and constitutionally protected administrative tribunals and boards created by land claims agreements, namely Institutes of Public Government such as the Nunavut Wildlife Management Board (NWMB), also shoulder a common law duty to consult when making decisions that affect Inuit in

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<sup>17</sup> *Little Salmon/Carmacks First Nation*, *supra* note 2, *cf* with the dissent of Justice Deschamps at paras 94, 107:

I disagree with Binnie J.'s view that the common law constitutional duty to consult applies in every case, regardless of the terms of the treaty in question. And I also disagree with the appellants' assertion that an external duty to consult can never apply to parties to modern comprehensive land claims agreements and that the Final Agreement constitutes a complete code. In my view, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), stands for the proposition that the common law constitutional duty to consult Aboriginal peoples applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty. Moreover, it is essential to understand that in this context, the signature of the treaty entails a change in the nature of the consultation. When consultation is provided for in a treaty, it ceases to be a measure to prevent the infringement of one or more rights, as in *Haida Nation*, and becomes a duty that applies to the Crown's exercise of rights granted to it in the treaty by the Aboriginal party. This means that where, as in *Mikisew*, the common law duty to consult applies to treaty rights despite the existence of the treaty—because the parties to the treaty included no provisions in this regard—it represents the minimum obligational content.... To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to me to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

<sup>18</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

<sup>19</sup> *R v Kapp*, 2008 SCC 41.

<sup>20</sup> See e.g. *Nunavut Tunngavik Inc v Canada (Attorney General)*, 2014 NUCA 02.

<sup>21</sup> See NLCA, *supra* note 11, pt 2.73, which provides that “[n]othing in the Agreement shall be construed so as to deny that Inuit are an [A]boriginal people of Canada, or, subject to Section 2.7.1, affect their ability to participate in or benefit from any existing or future constitutional rights for [A]boriginal people which may be applicable to them....” Given that the NLCA was concluded in 1999, before much of the jurisprudence on the duty to consult was developed, it stands to reason that the evolving duty to consult jurisprudence is a “future constitutional right,” as contemplated in 1999.

Nunavut.<sup>22</sup> Understanding how and when the common law duty applies to the NWMB, if at all—*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*<sup>23</sup> teaches us that unless explicitly authorized by statute, administrative tribunals are not legally authorized to fulfill the Crown’s common law duty to consult, but can decide whether the Crown has discharged that duty—is compounded when lands settled in these agreements and access to wildlife are shared among various Aboriginal peoples.<sup>24</sup>

Although not all overlapping with each other/one another, each of the land claims agreements named above contain some overlapping land settlement areas, meaning that the beneficiaries of each agreement share use of and jurisdiction over certain areas of land within each of their settlement areas—and possibly *without*. Found within each of these agreements, however, are obligations on the various beneficiaries of the agreements to consult *with one another* on matters pertaining to wildlife—a particularly important aspect of each of these

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<sup>22</sup> One author has argued that it does not. See McClurg, *supra* note 5 at 82–83 (“In general it is agreed that common law consultation requirements will often necessitate consultation beyond what is spelled out in the land claims agreement. On this point, debate has emerged over the extent to which the NWMB itself should be bound by these constitutional consultation obligations. The NWMB has denied that it should be so bound and argues that any duties beyond those spelled out in the land claims agreement belong solely to the government. In other words, the NWMB advocates a strict and technical application of consultation duties based solely on those that are textually or constitutionally mandatory. A question then emerges as to whether or not the NWMB can be constitutionally obligated to consult beyond the requirements set out in the land claims agreement.”); see also Morris Popowich, “The National Energy Board as Intermediary between the Crown, Aboriginal Peoples, and Industry” (2007) 44 Alta L Rev 837; see also Janna Promislowa, “Irreconcilable?: The Duty to Consult and Administrative Decision Makers” (2013) 26 Can J Admin L & Prac 251.

<sup>23</sup> *Rio Tinto Alcan*, *supra* note 2 at paras 60–61:

A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal’s enabling statute, and will require discerning the legislative intent: Conway, at para. 82. A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

<sup>24</sup> In February 2015, the NWMB decided, based on a legal opinion provided by David Mullan, that it had the “capacity... to determine whether the Crown (through the Department of Fisheries and Oceans) met any constitutional duty to consult and accommodate affected Inuit [in a NWMB proceeding].” See Letter from David J. Mullan to the Nunavut Wildlife Management Board (6 February 2015), online: NMWB <<http://www.nwmb.com/inu/public-hearings-meetings/inulimaanik-tuharahuaknik/2015-2/public-hearing-to-consider-the-establishment-of-a-management-unit-and-total-allowable-harvest-for-foxe-basin-walrus/nwmb-relevant-documents-14/5369-nwmb-letter-to-co-management-partners-regarding-the-legal-capacity-of-the-nwmb-to-assess-whether-the-crown-has-fulfilled-its-constitutional-obligation-to-consult-eng/file>>; see also David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?” (2011) 24 Can J Admin L & Prac 233.

agreements and the Aboriginal peoples who signed them—in these shared areas of land. Except for a few provisions in the various agreements, little of the common law duty to consult is explicitly prescribed to government. This leaves the question as to whether the duty is applicable (and how it is to be fulfilled) still open to legal debate—though Nunavut Tunngavik Inc., the entity that represents the legal, Aboriginal and treaty rights of Inuit in Nunavut, holds that it does, and even contemplates it.<sup>25</sup>

Thus, even if it is sufficiently well-settled that the common law duty to consult Aboriginal peoples is extant on Canada’s federal, provincial, and territorial governments (the “Crown”) to consult any and all Aboriginal peoples when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or treaty rights,<sup>26</sup> including the Inuit of Nunavut, it is not my aim in this paper to illustrate, definitively, how this common law duty to consult would be discharged by government (or an institute of public government) in Nunavut, though I will touch upon it at various times throughout this paper. Rather, it is my aim to illustrate how we find in these agreements a separate and unique constitutional duty to consult, concurrent to the common law one that exists for government, extant on Inuit (or Cree)

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<sup>25</sup> “Response of Nunavut Tunngavik Inc. to the Federal Interim Consultation Guidelines,” 26 May 2009, online: <<http://www.tunngavik.com/documents/publications/administration/NTI%20Response%20to%20Proposed%20Consultation%20Guidelines%20-%20May%2026%2009%20final%20doc.pdf>>:

Where the modern treaty reveals no clear and plain intention to preclude the application of the Crown’s common law duty to consult, it is appropriate to hold that this duty applies and reinforces the Aboriginal group’s modern treaty rights. ... The honour of the Crown would be breached, and the reconciliation process undermined, if the Crown were completely free to exercise its discretionary powers in a way that could seriously impair the exercise of treaty rights, rights which were the product of hard bargaining and major compromise. Thus, the consultation and accommodation process acts as an essential check on the Crown’s wide discretionary powers, and serves to ensure the continuation of the reconciliation process under modern treaties. It is particularly just, and in keeping with the honour of the Crown, that the duty to consult applies to treaties such as the NLCA, which were drafted prior to the *Haida* litigation. This is because the parties to the NLCA negotiated the NLCA at a time when they did not know that the Crown has a legal duty to consult prior to making decisions that stand to impair treaty rights. Since the parties developed the NLCA provisions with no awareness of that legal status quo, the duty to consult may only be ousted with clear and plain treaty language. There should be a clear and plain indication that the Crown’s related treaty obligations are exhaustive before such treaties should be construed as ousting the duty to consult. No such indication is present in the NLCA.... In any event, the potential for conflict between specific NLCA provisions and the duty to consult ultimately seems to be more theoretical than real. For the consultation issues discussed below, the NLCA reveals no intention by the parties to preclude meaningful Crown consultation with Inuit about decisions that stand to affect Inuit rights under the NLCA, and in some cases, it expressly contemplates Crown-Inuit consultation akin to that described in *Haida*. Thus, although NTI relies first and foremost on s. 2.7.3(a) to assert the application of the common law duty to consult in relation to Inuit rights under the NLCA, it is also demonstrated for the issues discussed that the NLCA reveals no intention to preclude consultation or else expressly contemplates consultation that is essentially in keeping with the common law consultation principles. Even without s. 2.7.3(a), the duty to consult and the NLCA can apply harmoniously.

<sup>26</sup> See *Haida Nation*, *supra* note 2; *Taku River Tlingit First Nation*, *supra* note 2; *Mikisew Cree First Nation*, *supra* note 2.

beneficiaries to consult with Inuit (or Cree) beneficiaries on wildlife matters in overlapping land settlement areas.<sup>27</sup>

To better illustrate the scope and content of this separate and unique constitutional duty to consult, I will, in this paper, examine the Nunavik Marine Region Wildlife Board's jurisdiction and the Nunavut Wildlife Management Board's jurisdiction to set harvest quotas on polar bears in the Foxe Basin, an ambulatory subpopulation. In Part I, I briefly discuss the Foxe Basin and the nature of harvesting quotas in the Nunavik Inuit Settlement Area and the Nunavut Settlement Area. In Part II, I examine four of the various land claims agreements that the Government of Canada has executed in Northern Canada. In Part III, I examine the Nunavut *Wildlife Act* as it relates to the separate and unique duty to consult I have identified in the paper, and in Part IV I further discuss the common law duty to consult.

## I THE FOXE BASIN AND HARVEST QUOTAS

The Foxe Basin is a marine region, north of Hudson Bay and the Hudson Strait, composed of waters and settlement lands found in both the Nunavut Settlement Area (NSA) and the Nunavik Inuit Settlement Area (NISA). In other words, the Foxe Basin is both part of the NISA and part of the NSA. The polar bear subpopulation in the Foxe Basin is therefore harvested in both Nunavut and Quebec, in accordance with three adjacent/overlapping land claims areas: the Nunavik Marine Region (NMR), the James Bay and Northern Quebec Settlement Area (JBNQSA), and the NSA. Wildlife management in both Nunavut and Nunavik is a co-management regime, meaning that wildlife boards make decisions regarding wildlife with subsequent government approval. I will return to the issue of government approval later in the paper.<sup>28</sup> Each board in Nunavut and Nunavik has the legal jurisdiction to set harvesting quotas and the basic needs level of each Inuit beneficiary group it is responsible for.

The basic needs level is the total amount of a particular species of wildlife that may be lawfully harvested by Inuit for subsistence purposes.<sup>29</sup> Where the basic needs level is *not* exceeded by a total allowable harvest (TAH)—the total amount of particular species of wildlife that may be harvested—it is presumed that the TAH is allocated, entirely, to the basic needs level.<sup>30</sup> Where the basic needs level is exceeded by the TAH, the excess is distributed by

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<sup>27</sup> I say constitutional because the duty is created by the way of treaties, and treaties enjoy constitutional protection under s 35 of the *Constitution Act, 1982*.

<sup>28</sup> It is here where questions of the “consult to modify” process raise questions about the common law duty to consult. See *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at para 124 (“I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage the Applicants were essentially shut out of the process.”).

<sup>29</sup> NLCA, *supra* note 11, pt 5.6.1 (It is important to distinguish Inuit harvesting rights as articulated in pt 5.6.1 which states that: “... an Inuk shall have the right to harvest that stock or population in the Nunavut Settlement Area up to the full level of his or her *economic, social, and cultural* needs, subject to the terms of this Article” [emphasis added].).

<sup>30</sup> *Ibid*, art 5.6.20.

an allocation system, where the communities in each of the settlement areas are allocated a portion of the excess TAH.<sup>31</sup>

As noted earlier, wildlife management boards with decision-making authority exist in two jurisdictions: in Nunavut, the Nunavut Wildlife Management Board (NWMB), pursuant to the *Nunavut Land Claims Agreement*, and in Nunavik, the Nunavik Marine Region Wildlife Board (NMRWB), pursuant to the *Nunavik Inuit Land Claims Agreement*. The Coordinating Committee under the *James Bay and Northern Quebec Agreement* has recommendation powers, but no rule-making power *per se*. In the next part, I explore in greater detail the wildlife management regimes contained in these various agreements, how these wildlife management boards interact with one another, and how they share jurisdiction over the Foxe Basin polar bear subpopulation.

## II WILDLIFE MANAGEMENT REGIMES IN NUNAVIK AND NUNAVUT

### A. Nunavik Inuit Land Claims Agreement

Nunavik is the settlement area of the Inuit who traditionally lived and who currently live, generally speaking, in the northernmost part of Quebec, although the James Bay Cree are present in neighbouring areas as well. Following signature of the *Nunavik Inuit Land Claims Agreement*, Nunavik was created and given legal effect in 2008 with the passage of the *Nunavik Inuit Land Claims Agreement Act*.<sup>32</sup> Similar in principle and content to the *Nunavut Land Claims Agreement*, which was given legal effect in 1999 with the passage of the *Nunavut Land Claims Agreement Act*, NILCA creates certain duties on Nunavik Inuit to consult with Nunavut Inuit. One significant difference, however, exists between them: the NLCA contemplates and creates a public government to govern the territory, unlike the NILCA in which the Inuit of Nunavik do not have self-government. More specifically, on the impact these agreements have on one another and the consultation duties created as a result, NILCA article 27 governs the relationship between Nunavik Inuit beneficiaries and Nunavut Inuit beneficiaries; however, in order to understand the full force and effect that article 27 provides, and later, article 40 in the NLCA, it is necessary to survey some provisions of the agreements that precede it.

The analysis therefore begins with: (a) a study of the NILCA, and moves to (b) the *James Bay and Northern Quebec Agreement*, then briefly to (c) the *Agreement Between The Crees of Eeyou Istchee And Her Majesty The Queen*, then to (d) the NLCA, then to (e) the *Nunavut Wildlife Act*, and finally to (f) the minister's common law duty to consult.

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<sup>31</sup> See generally *ibid*, arts 5.6.16–5.6.31.

<sup>32</sup> NILCA, *supra* note 8, pt 12.

## 1. NILCA Articles 3 to 5

### a. Article 3

Part 3.1 of the NILCA provides that the Nunavik Inuit Settlement Area (NISA) comprises: (a) the Nunavik Marine Region (NMR), and (b) the Labrador Inuit Settlement Area portion of the Nunavik Inuit/Labrador Inuit overlap area.<sup>33</sup> In effect, the NISA is a shared area. Although the agreement does not state so, the NISA has land areas that are shared with the Nunavut Inuit and the NSA. It is instructive to note that article 3.6 also provides that “for greater certainty, Nunavik Inuit shall enjoy additional rights to areas outside NISA as provided by other provisions of this agreement.”<sup>34</sup> Thus, the NILCA contemplates that NILCA beneficiaries may have *rights outside of the NISA* (as established in NISA)—and, therefore, possibly in the NSA.

### b. Article 4

Article 4 provides that Inuit beneficiaries enrolled on the beneficiaries list of the *James Bay and Northern Quebec Agreement* (JBNQA) are also eligible to register as beneficiaries under the NILCA.<sup>35</sup> In order to benefit from the NILCA, however, a person must be enrolled on the NILCA Enrolment List.<sup>36</sup> A person enrolled under NILCA may not be enrolled in another agreement, unless NILCA beneficiaries are also parties to that agreement.<sup>37</sup> A person enrolled as a beneficiary under another agreement may enrol under the NILCA provided that that person discontinues enrolment from the previous agreement.<sup>38</sup> This means that a person cannot be enrolled in both the NILCA and the NLCA. These enrolment lists are available to the public.<sup>39</sup>

### c. Article 5

#### *Part 5.1: Nunavik Marine Region*

NILCA part 5.1.2 recognizes and reflects several principles in respect of the NMR, the most germane of which here are that: from Nunavik Inuit traditional use and occupancy flow certain legal interests with respect to wildlife that Nunavik Inuit enjoy throughout the NMR; there is a need for an effective wildlife management system that respects Nunavik Inuit harvesting rights and priorities; Nunavik Inuit shall have an effective role in all aspects of wildlife management; and, government has ultimate responsibility for wildlife management and agrees to exercise this responsibility in the NMR in accordance with the agreement.<sup>40</sup>

In the NILCA, as it is in the NLCA, “Government” is defined as “the Government of Canada or the Government of Nunavut, or both, as the context requires, depending on their

<sup>33</sup> *Ibid*, pt 3.1.

<sup>34</sup> *Ibid*, art 3.

<sup>35</sup> *Ibid*, art 4.1.

<sup>36</sup> *Ibid*, art 4.2.

<sup>37</sup> *Ibid*, art 4.5.

<sup>38</sup> *Ibid*, art 4.6.

<sup>39</sup> *Ibid*, art 4.10.

<sup>40</sup> *Ibid*, pt 5.1.2 [emphasis added].

jurisdiction and the subject matter referred to.”<sup>41</sup> Reading part 5.1.2 with this definition in mind would suggest that the common law duty to consult (and accommodate where necessary), is placed on government to manage wildlife in accordance with these part 5.1.2 principles. While it is not exactly clear how this common law duty is to be fulfilled, it is sufficiently clear that government must manage wildlife in a way that is cognizant of and responsible to the “legal interests with respect to wildlife which Nunavik Inuit enjoy throughout the NMR.”<sup>42</sup> Government should act in a way that ensures “Nunavik Inuit ... have an effective role in all aspects of wildlife management.”<sup>43</sup>

Part 5.1.3 states a number of objectives with respect to the NMR wildlife management system; but, most significantly, it also “establishes the NMRWB to make decisions pertaining to wildlife management.”<sup>44</sup> Part 5.2 does this more extensively, however.

### *Part 5.2: Nunavik Marine Region Wildlife Board*

Part 5.2.1 provides that the day NILCA comes into force, an institution of public government to be known as the Nunavik Marine Region Wildlife Board (NMRWB), consisting of seven members, will be established.<sup>45</sup> Given that NILCA is essentially a treaty, the NMRWB is a constitutionally created and protected administrative tribunal.

Part 5.2.3 of NILCA goes on to establish the mandate of the NMRWB. According to part 5.2.3(a), the NMRWB, as the “main instrument of wildlife management in the NMR and the main regulator of access to wildlife,” is responsible for “establishing, modifying or removing levels of total allowable take” of polar bears—in the example I am using here, with respect to the Foxe Basin polar bear subpopulation.<sup>46</sup> But this responsibility is not that of the NMRWB alone—it is “shared” with the Nunavut Wildlife Management Board (NWMB).

As we will see, the concept of total allowable take (TAT) found in the NILCA is similar to the concept of total allowable harvest found in the NLCA; however, the NILCA concept is different in that article 5.2.10 states the NMRWB “has *the sole authority* to establish or modify or remove from time to time as circumstances require levels of total allowable take or harvesting for all species *in the NMR*.”<sup>47</sup> (In the NLCA, the similar is stated: “[T]he NWMB shall have *sole authority* to establish, modify or remove, from time to time and as circumstances require, levels of total allowable harvest or harvesting in the Nunavut Settlement Area.”<sup>48</sup>). Stated another way, only the NMRWB can set the TAT for polar bears *in the NMR*. Because the NMR is a part of the Foxe Basin, and a part of the NMR also exists as the NSA and Nunavut, the question arises as to whether the NWMB or the government is stripped of jurisdiction to make decisions with respect to those mutual settlement areas; or, is it the case

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<sup>41</sup> *Ibid*, art 1 [emphasis added]. Interestingly, the Government of Quebec is excluded from the definition, even though Nunavik geographically consists of almost all of Northern Quebec.

<sup>42</sup> *Ibid*, pt 5.1.2(b).

<sup>43</sup> *Ibid*, pt 5.1.2.(i).

<sup>44</sup> *Ibid*, art 5.1.3.

<sup>45</sup> *Ibid*, pt 5.2.1.

<sup>46</sup> *Ibid*, pt 5.2.3 [emphasis added].

<sup>47</sup> *Ibid*, art 5.2.10 [emphasis added].

<sup>48</sup> *Ibid*, art 5.6.16.

that the NMRWB can make decisions affecting those parts of the NMR which are also part of the NSA, and vice-versa for the NWMB and the NSA? The answer is likely to be the latter of the two options, provided such a decision follows a path of consultation with the NWMB.<sup>49</sup> But still, certainty is lacking.

Returning to the powers of the NMRWB, part 5.2.11 enables the TAT to be expressed “by any method that the NMRWB considers appropriate.”<sup>50</sup> (Similar provisions exist for the expression of non-quota limitations on the taking of various species.<sup>51</sup>) The TAT, however, the agreement mandates, should benefit Nunavik Inuit beneficiaries.<sup>52</sup>

As we saw a moment ago, article 5.2.10 presents an interpretation issue: if the NMRWB is the only authority that can set a TAT *in the NMR*, does then the TAH set by the NWMB in Nunavut, in relation to the NSA, affect Nunavik Inuit beneficiaries in the NMR? In other words, do any decisions made by the NMRWB that affect the NMR extend into the Foxe Basin and do these decisions by extension affect Nunavut Inuit beneficiaries in the NMR and vice-versa? This question, in many ways, and more importantly, the answer, underlies and informs the separate and unique statutory duty to consult this paper has identified exists. In order to properly answer this question, we must proceed with the analysis.

### *Part 5.3: Harvesting*

Part 5.3 of NILCA is devoted to Nunavik Inuit’s rights to harvest. Part 5.3.1 states that where a TAT has *not* been established by the NMRWB in respect of a species or wildlife, a Nunavik Inuit may harvest “up to the full level of his or her economic, social, and cultural needs” that species or wildlife without limitation.<sup>53</sup> Full level of needs means full level of harvest.<sup>54</sup> Conversely, where a TAT *has been* established by the NMRWB, Nunavik Inuit have the right to harvest that species in accordance with article 5.<sup>55</sup>

Article 5 presumes that Nunavik Inuit need the TAT of polar bears when and if established by the NMRWB.<sup>56</sup> When assessing that need, certain considerations must be taken.<sup>57</sup> The allocation of the TAT, for example, must be ordered according to priority.<sup>58</sup> If the TAT is equal to or less than the basic needs level or adjusted basic needs level of Nunavik Inuit, then Nunavik are entitled to the entire TAT.<sup>59</sup>

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<sup>49</sup> For an interesting discussion as to whether the duty to consult is extant on independent, quasi-judicial tribunals and agencies, see David Mullan, “The Duty to Consult Aboriginal Peoples—The Canadian Example” 22 Can J Admin L & Prac 107 at 119–20.

<sup>50</sup> NILCA, *supra* note 8, pt 5.2.11.

<sup>51</sup> *Ibid*, pt 5.2.19.

<sup>52</sup> *Ibid*, pt 5.2.12.

<sup>53</sup> *Ibid*, pt 5.3.1.

<sup>54</sup> *Ibid*, pt 5.3.2.

<sup>55</sup> *Ibid*, pt 5.3.3.

<sup>56</sup> *Ibid*, pt 5.3.7.

<sup>57</sup> *Ibid*, pt 5.3.10.

<sup>58</sup> *Ibid*, pt 5.3.13.

<sup>59</sup> *Ibid*, pt 5.3.14.

*Part 5.4: Harvesting [within and] beyond the NMR*

Part 5.4 of the NILCA is devoted to wildlife management and harvesting in marine areas beyond the NMR and significantly informs the separate and unique constitutional duty to consult by the beneficiaries as well as the appropriate government's duty to consult with Nunavik Inuit/NMRWB (as well as JBNQ Inuit and Eeyou Crees) should a TAH be adjusted, one way or the other, by the NWMB or the NMRWB (whichever the case may be).

Part 5.4.4 states as follows:

Government *shall seek the advice of the NMRWB* with respect to any wildlife management decisions in Southern and Northern Davis Strait and Hudson Bay Zones *which would affect the substance and value of Nunavik Inuit harvesting rights and opportunities within the NMR*. The NMRWB shall provide relevant information to Government that would assist in wildlife management in Southern and Northern Davis Strait and Hudson Bay Zones and adjacent areas.<sup>60</sup>

Part 5.4.4 teaches us that there is a stated duty on government (as noted, the appropriate level of government will be defined by the context of action or decision to be taken) to “seek the advice of the NMRWB with respect to any wildlife management decisions in [the Foxe Basin] ... which would affect the substance and value of Nunavik Inuit harvesting rights and opportunities within the NMR.”<sup>61</sup> If and when the TAT of the Foxe Basin polar bear subpopulation were to be increased or decreased, whatever the case may be, there would be, it seems, a common law duty to consult with the NMRWB in respect of that change. There is likely to be, therefore, at least a common law duty on government to consult in this scenario because part 5.4.4 unambiguously states that the government *must* seek the advice of the NMRWB. We shall see greater support for this proposition later in the discussion of NLCA article 40.2.19.

Part 5.4.21 of NILCA adds NMRWB powers with respect to lands *outside of the NMR*:

The Nunavik Marine Region Planning Commission (NMRPC), the Nunavik Marine Region Impact Review Board (NMRIRB) and *the NMRWB may jointly, as a Nunavik Marine Region Council, or individually advise and make recommendations to other government agencies regarding marine areas outside of the NMR and Government shall consider such advice and recommendations in making decisions which affect marine areas outside of the NMR*.<sup>62</sup>

Part 5.4.21 teaches us that the NMRWB may—which could be interpreted to mean that no invitation to do so is needed—“advise and make recommendations *to other government agencies regarding marine areas outside of the NMR and Government shall consider such advice and recommendations in making decisions which affect marine areas outside of the NMR*”.<sup>63</sup> Notwithstanding that the advice power exists in relation to government agencies and

<sup>60</sup> *Ibid*, pt 5.4.4 [emphasis added].

<sup>61</sup> *Ibid*.

<sup>62</sup> NILCA, *supra* note 8, pt 5.4.21 [emphasis added].

<sup>63</sup> *Ibid* [emphasis added].

not government itself, in effect, Part 5.4.21 states that the NMRWB may make submissions to the NWMB regarding marine areas outside of the NMR – for example, the NSA or areas of the Foxe Basin not in the NMR – and government *must* consider such advice given. This is another very powerful part of the NILCA, and is perhaps only superseded in importance by article 27, discussed below.

## 2. NILCA Article 27

Article 27 is arguably the most important article in the NILCA in respect of the subject matter addressed in this paper. As does article 40 of the NLCA, which will be examined in a few moments, article 27 of NILCA contemplates reciprocal arrangements between Nunavik Inuit and Nunavut Inuit (the “Two Groups”) in respect of the lands each group traditionally and equally used and occupied<sup>64</sup> irrespective of NILCA and NLCA boundaries, and places obligations on each to consult one another in matters affecting harvesting.

Part 27.1.1 states the object of Article 27:

The object of this Article is to provide rights reciprocal to Article 40 under the Nunavut Land Claims Agreement as follows:

- a. to provide for the continuation of harvesting by each Group in areas traditionally used and occupied by it, *regardless of land claims agreement boundaries*;
- b. to identify *areas of equal use and occupancy* between the Two Groups and with respect to such areas, to provide for:
  - c. *joint ownership of lands by the Two Groups*;
  - d. sharing of wildlife and certain other benefits by the Two Groups;
  - e. *participation by the Two Groups in regimes for wildlife management, land use planning, impact assessment and water management in such areas*; and
  - f. *to promote cooperation and good relations between the Two Groups and among the Two Groups and Government.*<sup>65</sup>

The whole of Part 27.1.1 as the object of Article 27 informs the separate and unique duty to consult by the beneficiaries who signed the agreements and, arguably, the governments’ duty to consult as well; however, “participation by the Two Groups in regimes for wildlife management” and “promot[ing] cooperation and good relations between the Two Groups and among the Two Groups and Government” are key in this respect.<sup>66</sup>

### *Part 27.3: Wildlife Harvesting*

Part 27.3.1 illustrates that Nunavik Inuit “have the same rights,” with certain limitations, to harvest wildlife in the NSA in accordance with NLCA Article 5 as do Nunavut Inuit:

<sup>64</sup> *Ibid*, pt 27.2.1 (“In this Article: ‘areas of equal use and occupancy’ means those areas described in Schedule 40-1 of the Nunavut Land Claims Agreement, reproduced in Schedule 27-1 of this Agreement, and depicted for information purposes only on the map appended thereto.”).

<sup>65</sup> *Ibid*, pt 27.1.1[emphasis added].

<sup>66</sup> *Ibid*.

Subject to sections 27.3.3 and 27.3.4, Nunavik Inuit *have the same rights respecting the harvesting of wildlife in the marine areas and islands of the Nunavut Settlement Area* traditionally used and occupied by them as the Inuit of Nunavut under Article 5 of the Nunavut Land Claims Agreement except Nunavik Inuit do not have the rights under Parts 2, 4 and 5, sections 5.6.18 and 5.6.39, Part 8 and sections 5.9.2 and 5.9.3 of that Agreement.<sup>67</sup>

The rights respecting wildlife harvesting that the Nunavik Inuit are excluded from are not germane to the analysis undertaken here. TAT or TAH, nevertheless, when exceeded by the basic needs levels or the adjusted basic needs levels of Nunavik and Nunavut Inuit, will be divided by the Two Groups “so as to reflect the ratio of their basic needs levels.”<sup>68</sup> This is what would happen with respect to the Foxe Basin polar bear subpopulation.

*Part 27.5: Areas of Equal Use and Occupancy: Other Benefits*

Part 27.5 details other benefits provided to each of the two groups based on areas of equal use and occupancy. 27.5.1 and 27.5.2 state, respectively, that “in the areas of equal use and occupancy, the rights of the Inuit of Nunavut pursuant to Section 5.6.39 and Part 8 of Article 5 and to Articles 8, 9, 26, 33, 34 of the Nunavut Land Claims Agreement *shall apply equally to Nunavik Inuit*”<sup>69</sup> and “in the areas of equal use and occupancy, the rights of Nunavik Inuit pursuant to paragraphs 5.3.13.1 (c, d & e), Section 5.3.15 and Articles 11, 20 and 21 of this Agreement *shall apply equally to the Inuit of Nunavut...*”<sup>70</sup> Finally, 27.5.3 adds that “Nunavik Inuit may exercise the rights provided under Sections 5.8.2 and 5.8.3 of this Agreement in the areas of equal use and occupancy.”<sup>71</sup> In short, the Two Groups are more or less seen as enjoying equal harvesting rights throughout the NSA and the NISA, which in some ways “collides” in the Foxe Basin.

*Part 27.6: Areas of Equal Use and Occupancy: Management*

Part 27.6 teaches us that Nunavik beneficiaries (through Makivik Corporation, the entity responsible for representing the legal, Aboriginal and treaty rights of Nunavik Inuit) appoint to NWMB—as well as other boards in Nunavut—members from Nunavik:

Notwithstanding section 27.3.1, Makivik, on behalf of Nunavik Inuit, has the right to appoint to the NWMB and to nominate to each of the NPC, NIRB and the NWB, members equal to one half of those appointed or nominated by the DIO, which members shall be appointed in the same manner as members nominated by the DIO. Any members so appointed shall replace an equal number of members appointed or nominated by the DIO for decisions of the

<sup>67</sup> *Ibid*, pt 27.3.1 [emphasis added].

<sup>68</sup> *Ibid*, pt 27.3.3 (“The basic needs level for Nunavik Inuit and the basic needs level for the Inuit of Nunavut shall be determined on the basis of available information. Where the basic needs levels of the Two Groups exceeds the total allowable harvest or the total allowable take, the total allowable harvest or the total allowable take shall be allocated between the Two Groups so as to reflect the ratio of their basic needs levels.”).

<sup>69</sup> *Ibid*, pt 27.5.1 [emphasis added].

<sup>70</sup> *Ibid*, pt 27.5.2 [emphasis added].

<sup>71</sup> *Ibid*, pt 27.5.3 [emphasis added].

NWMB, NPC, NIRB and NWB that apply to activities that take place in the areas of equal use and occupancy, but shall not otherwise be considered to be or act as a member of those institutions.<sup>72</sup>

This appointment power ensures that the interests of the NMR, the NISA and Nunavik Inuit are represented at the decision-making level.<sup>73</sup>

*Part 27.7: Mutual Protection of Rights and Interests, Between the Two Groups*

Parts 27.7.1–27.7.3 are critical to understanding why and how the beneficiaries of the agreements and their respective wildlife management boards are bound by a duty to consult. These provisions state:

Each Group shall exercise its rights with respect to harvesting and resource management, including rights derived from this Agreement, the Nunavut Land Claims Agreement and the James Bay and Northern Québec Agreement, *in a manner consistent with the rights and interests of the other Group.*

In exercising rights with respect to harvesting and resource management *which may affect the other Group*, each Group shall be guided by the principles of conservation and the importance of effective environmental protection and, accordingly, shall pursue the application of appropriate management techniques aimed at the rational and sustainable use of resources.

*Each Group shall consult with the other with respect to all issues concerning all aspects of harvesting or resource management over which the Group has control or influence and which may affect the other Group. The obligation to consult shall include the obligation to give timely written notice and to facilitate in the making of adequate written representations.*<sup>74</sup>

As Section 27.7.3 shows us, Nunavik and Nunavut Inuit beneficiaries must “consult with [one another] with respect to all issues concerning all aspects of harvesting or resource management over which the Group has control or influence and which may affect the other Group.”<sup>75</sup> Increasing the TAH (or TAT) of the Foxe Basin polar bear subpopulation, for example, is precisely a harvesting and resource management issue over which NWMB has control or influence affecting the interests of NILCA beneficiaries in the NMR.

Section 27.3.3 also shows us that the duty to consult involves the duty to give timely written notice and to facilitate in the making of adequate written representations to the NWMB.<sup>76</sup> Additionally, where the NILCA conflicts with Article 40 of the NLCA, Article

<sup>72</sup> *Ibid*, pt 27.6.

<sup>73</sup> *Ibid*, part 27; Parts 27.6.2–27.6.4 add some other similar and relevant provisions.

<sup>74</sup> *Ibid*, pts 27.7.1–27.7.3 [emphasis added].

<sup>75</sup> *Ibid*, pt 27.7.3.

<sup>76</sup> See *Mullan*, *supra* note 49, for an interesting discussion of how the content of the duty to consult is similar to administrative law principles.

40 of the NLCA has precedence over the NILCA.<sup>77</sup> The provisions discussed above already demonstrate that the NILCA places on beneficiaries, the NMWB, and, in a limited case, government, a duty to consult Nunavik Inuit in respect of increasing the TAH (or TAT) of the Foxe Basin polar bear subpopulation, but we can find more authority for this assertion elsewhere.

## B. James Bay and Northern Quebec Agreement

The *James Bay and Northern Quebec Agreement* (JBNQA) provides similar provisions as do the NILCA and the NLCA. Section 24 dealing with “Hunting, Fishing and Trapping” is the relevant section in the present context; however, the JBNQA does not contain a definition for or concept similar to the total allowable take or total allowable harvest.<sup>78</sup>

Like the NILCA and the NLCA, in the JBNQA, conservation is a key consideration in wildlife management.<sup>79</sup> Under the JBNQA, the entity for managing wildlife in accordance with Section 24 of the JBNQA is the “Coordinating Committee,” a body similar in principle to the NMRWB and the NWMB.<sup>80</sup> The Coordinating Committee does not, however, have any rule or regulation-making authority like the NMRWB or the NWMB do.<sup>81</sup>

Regulations proposed by government—although not defined in the agreement, but understood to mean the (Provincial) Government of Quebec or Government of Canada—must be submitted to the Coordinating Committee for “advice.”<sup>82</sup> The Coordinating Committee may submit recommendations, but the Provincial and Federal Ministers have the discretion to accept or not accept these recommendations.<sup>83</sup> Additional submission powers are given to the Coordinating Committee by the agreement.<sup>84</sup>

Although a duty to consult exists at common law, the duty upon government to consult, in matters respecting wildlife and harvesting rights, in this context, is similarly articulated in

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<sup>77</sup> NILCA, *supra* note 8, pt 27.8.4 (“In the event of any inconsistency or conflict between this Agreement and Article 40 of the Nunavut Land Claims Agreement, the latter shall prevail to the extent of such inconsistency or conflict.”).

<sup>78</sup> *Ibid*, art 24.1.

<sup>79</sup> *Ibid*, pt 24.2.1 (“The Hunting, Fishing and Trapping Regime established by and in accordance with this Section shall be subject to the principle of conservation.”).

<sup>80</sup> JBNQA, *supra* note 9, s 24.4.1 (“A Hunting, Fishing and Trapping Coordinating Committee (hereinafter referred to as the ‘Coordinating Committee’), an expert body made up of Native and government members, is established to review, manage, and in certain cases, supervise and regulate the Hunting, Fishing and Trapping Regime established by and in accordance with the provisions of this Section.”).

<sup>81</sup> *Ibid*, s 24.4.25 (“The Coordinating Committee shall have the right to initiate, discuss, review and propose all measures relating to the Hunting, Fishing and Trapping Regime in the Territory. The Coordinating Committee may propose regulations or other measures relating to the regulation, supervision and management of the Hunting, Fishing and Trapping Regime.”).

<sup>82</sup> *Ibid*, s 24.4.26 (“All regulations relating to the Hunting, Fishing and Trapping Regime proposed by responsible governments shall be submitted to the Coordinating Committee for advice before enactment. Proposals with respect to the establishment of parks, ecological reserves, wildlife sanctuaries and similar classifications of land shall be submitted to the Coordinating Committee except when such proposals deal with land situated within settlements.”).

<sup>83</sup> *Ibid*, s 24.4.27.

<sup>84</sup> *Ibid*, s 24.4.29.

the JBNQA as it is in the NILCA and NLCA, perhaps rendering moot the question of whether the common law duty to consult is applicable in the settlement areas covered by the JBNQA. Section 24.4.36 of the JBNQA states:

Before submitting a new regulation or other decision for enactment or taking new action and before modifying or refusing to submit for enactment draft regulations or other decisions from the Coordinating Committee, the responsible Provincial or Federal Minister *shall consult with the Coordinating Committee* and shall endeavour to respect the views and positions of the Coordinating Committee on any matter respecting the Hunting, Fishing and Trapping Regime, the whole subject to the provisions of paragraph 24.4.37 and Sub-Section 24.12.<sup>85</sup>

The requirement to consult in Section 24.4.36 is placed on “the responsible Provincial or Federal Minister,” meaning that the common law duty to consult has been articulated in a treaty, and has been constitutionalized in this context. Whether there will be a duty to accommodate, will, per *Haida Nation*, we must assume, depend on the strength of the interest or the degree of harm that might befall the interests of the James Bay and Northern Quebec Cree.<sup>86</sup>

Section 24.5, dealing with “Powers of Native Authorities and Governments,” details the interplay among governments, the duty to consult and JBNQA beneficiaries in Categories I and II—specific areas of land:<sup>87</sup>

In Categories I and II, matters relating primarily to the protection of the wildlife resources rather than harvesting activity and hunting and fishing by non-Natives *shall be solely the jurisdiction of the responsible Provincial or Federal Government*. Such matters of sole jurisdiction shall include, inter alia, the establishment of general quotas for the Territory, the representation of the interests of the Territory at international and intergovernmental negotiations relating to wildlife management, *the regulation and management of wildlife insofar as this concerns the health of wildlife populations, the determination and protection of species requiring complete protection* as referred to in paragraph 24.3.2 and the regulation and conducting of research projects related to wildlife resources.<sup>88</sup>

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<sup>85.</sup> *Ibid*, s 24.4.36 [emphasis added].

<sup>86.</sup> *Haida Nation*, *supra* note 2.

<sup>87.</sup> “Category I” is an area of land in the territory described in ss 5 and 7 of the agreement and “Category II” is also an area of land in the territory described in ss 5 and 7 of the agreement.

<sup>88.</sup> JBNQA, *supra* note 9, s 24.5.1 [emphasis added].

Section 24.5.2 adds the following:

In Categories I and II, the responsible *Provincial and Federal Governments shall* exercise their powers with respect to matters referred to in paragraph 24.5.1 in the same manner as those powers are exercised with respect to Category III, namely they *shall exercise those powers only upon the advice of or after consulting with the Coordinating Committee as the preferential and exclusive spokesman empowered to formulate procedures, recommendations, positions and views respecting these matters.*<sup>89</sup>

Parts 24.5.3 and 24.5.4 add the powers of Native governments:

Notwithstanding the provisions of the preceding paragraphs 24.5.1 and 24.5.2, with respect to the matters referred to therein, in the case of the Crees, the Cree local government and/or regional authorities, and in the case of the Inuit, the local and/or regional government *shall have the power to pass by-laws affecting Categories I and II for Native people and for non-Natives permitted to hunt and fish thereon that are more restrictive than those regulations passed by the responsible Provincial or Federal Government.*

Subject to the power of the responsible Provincial or Federal Government to make regulations respecting the conservation of wildlife resources, in Categories I and II the Cree local governments and, in the case of the Inuit, the regional government, within their respective areas of primary and common interest, may make regulations, *which regulations in the case of their area of common interest in Category II shall be made jointly*, with respect to all matters specifically referring primarily to harvesting activity and to hunting and fishing by non-Natives and not primarily referring to the management of the wildlife resource itself including:

- a. The allocation of the general quotas established pursuant to this Section among individual Natives and non-Natives permitted to hunt and fish.
- b. Personal and community use.
- c. The control of facilities for sport hunting and sport fishing.
- d. Commercial fishing facilities.
- e. Research concerning Native harvesting.
- f. Seasons for harvesting and non-Native hunting and fishing and bag and possession limits, provided regulations made with respect to such matters shall be more restrictive than those regulations passed by the responsible Provincial or Federal Government.
- g. Harvesting methods subject to paragraph 24.3.12.
- h. Permits and licenses for the purpose of subparagraph 24.5.4 a). In the case of the Inuit, the regional government shall make regulations solely upon the recommendation of a committee composed only of Inuit. Such recommendations shall be binding on the regional government.<sup>90</sup>

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<sup>89</sup> *Ibid*, s 24.5.2 [emphasis added].

<sup>90</sup> *Ibid*, ss 24.5.3 and 24.5.4 [emphasis added].

Sections 24.5.3 and 24.5.4 enable Crees and Inuit to make certain regulations and bylaws that affect each of them, and, in certain cases, non-Natives, even if those regulations and bylaws are more restrictive than those imposed by the provincial or federal government.<sup>91</sup> Section 24.5.4 states that decisions will be made *jointly*.

Sections 24.6.2 and 24.6.4 speak to principles of conservation and harvesting guarantees for Native persons:

The principle of priority of Native harvesting shall mean that in conformity with the principle of conservation and where game populations permit, *the Native people shall be guaranteed levels of harvesting equal to present levels of harvesting of all species in the Territory.*

[...]

Subject to the principle of conservation and where populations of these species permit, the principle of priority of Native harvesting as provided for in this Sub-Section shall apply to marine mammals.<sup>92</sup>

Although in this agreement there is no *per se* statutory duty on government to consult with beneficiaries of the JBNQA, the duty still exists at common law and therefore it would be appropriate for the Coordinating Committee to be consulted and solicited for any recommendations it might like to make in respect of any decisions to increase the TAH (or TAT).

### C. Agreement Between the Crees of Eeyou Istchee and Her Majesty the Queen

The *Agreement Between The Crees of Eeyou Istchee And Her Majesty The Queen in Right of Canada Concerning The Eeyou Marine Region* defines “consult and consultation” similarly as does the NILCA: “the provision, to the party to be consulted, of notice of a matter to be decided in a manner that allows that party to effectively assess the matter and to prepare advice on the matter; of a reasonable period of time in which the party to be consulted may prepare its advice on the matter, and an opportunity to present such advice to the party obligated to consult; full and fair consideration by the party obligated to consult on any advice presented; and the written reasons within a reasonable period of time by the party obligated to consult for any advice that is rejected or varied.”<sup>93</sup>

The Eeyou Agreement is also relevant for the consultation duties it places on the Government of Nunavut.<sup>94</sup> The agreement states at Chapter 16.3 the following:

<sup>91</sup> This is arguably unconstitutional.

<sup>92</sup> JBNQA, *supra* note 9, ss 24.6.2–24.6.5 [emphasis added].

<sup>93</sup> Eeyou Agreement, *supra* note 10.

<sup>94</sup> *Ibid* (“Government is defined in the Agreement as “the government of Canada or the government of Nunavut or both, as the context requires, depending on their jurisdiction and the subject matter referred to, or else determined pursuant to section 2.20....”).

*Government shall seek the advice of the EMRWB [Eeyou Marine Region Wildlife Board] with respect to any Wildlife management decisions in the Hudson Bay Zone which would affect the substance and value of Cree Harvesting rights and opportunities within the EMR [Eeyou Marine Region]. The EMRWB shall provide relevant information to Government that would assist in Wildlife management in the Hudson Bay Zone and adjacent areas.*<sup>95</sup>

“Government” in the Eeyou Agreement is, as in other agreements, defined as the Government of Canada or the Government of Nunavut. Thus, Chapter 16.3 would place an onus on the NWMB, the NMRWB and government to seek the advice of the EMRWB<sup>96</sup> with respect to consideration of adjusting the TAH in the Foxe Basin polar bear subpopulation.

The Eeyou Agreement adds the following in 16.7:

The EMRPC, the EMRIRB and the EMRWB may jointly, as a Cree Marine Region Council, or severally advise and make recommendations to Government agencies regarding any marine area outside of the EMR and *Government shall consider such advice and recommendations in making decisions which affect any marine area outside of the EMR.*<sup>97</sup>

Thus, the EMRWB, in the same way the NILCA provides this power to the NMRWB, may make submissions to government *agencies* (and perhaps not government itself), the NWMB, the minister, or government and each and all are duty bound to consider any such advice or recommendations submitted.

## D. Nunavut Land Claims Agreement

An analysis of the NLCA follows the same methodology as of the NILCA. A key similarity between NILCA and NLCA is that both land claims agreements contemplate and define “Government” as either the Government of Nunavut or the Government of Canada; however, that is not a basis to say that one agreement is more authoritative than the other because Nunavut is a Canadian territory and Nunavik is not.<sup>98</sup> Similar to NILCA Article 27, while Article 40 generally governs the relationship between Nunavut Inuit beneficiaries in relation to other Aboriginal peoples, it is necessary to survey Article 5, dealing with wildlife, in order to understand the full force and effect that Article 40 provides overall.

### 1. Article 5

Article 5 of the NLCA is devoted to wildlife, the establishment of the Nunavut Wildlife Management Board (NWMB), and the NWMB as the main organ of wildlife management in Nunavut. A key definition in Article 5 is that of total allowable harvest, similar to take in the NILCA, which means “an amount of wildlife able to be lawfully harvested as established by

<sup>95</sup> *Ibid*, c 16.3 [emphasis added].

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*, c 16.7 [emphasis added].

<sup>98</sup> But remember pt 27.8.4 of NILCA, *supra* note 8: (“In the event of any inconsistency or conflict between this Agreement and Article 40 of the Nunavut Land Claims Agreement, the latter shall prevail to the extent of such inconsistency or conflict.”).

the NWMB pursuant to Sections 5.6.16 to 5.6.18.”<sup>99</sup> Section 5.6.16, examined momentarily, proves to be crucial to the analysis of the issues undertaken in this paper, but first we examine the role of the NWMB.

*Part 5.2.33: Nunavut Wildlife Management Board*

Part 5.2.33 is devoted to the Powers, Duties and Functions of the NWMB. As we saw earlier, Part 5.2.33 provides that “Government retains ultimate responsibility for wildlife management” but that “the NWMB shall be the main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife.”<sup>100</sup> We also saw that the NWMB has the power to establish, modify, or remove levels of total allowable harvest.<sup>101</sup>

Part 5.3.3 provides the criteria that ought to be considered in decisions made by the NWMB and Minister.<sup>102</sup> For the purposes of better answering the questions posed in this paper, Part 5.3.4 provides a step in the right direction toward understanding the duty to consult found in the NLCA. Part 5.3.4 states the following:

Certain populations of wildlife found in the Nunavut Settlement Area cross jurisdictional boundaries and are harvested outside the Nunavut Settlement Area by persons resident elsewhere. *Accordingly, the NWMB and Minister in exercising their responsibilities in relation to Part 6 shall take account of harvesting activities outside the Nunavut Settlement Area and the terms of domestic interjurisdictional agreements or international agreements pertaining to such wildlife.*<sup>103</sup>

However, Part 6 of the NLCA deals with Wildlife Compensation and is not immediately germane to the matter at hand. Nevertheless, we see that there is a duty to “take account of harvesting activities outside the Nunavut Settlement Area” which may be equated with a consultation duty.<sup>104</sup>

Provisions in respect of Inuit rights to harvest under circumstances where a TAH has been implemented, and one where it has not, which also exist in the NLCA, also similarly exist in the NLCA:

Where a total allowable harvest for a stock or population of wildlife has *not* been established by the NWMB pursuant to Sections 5.6.16 and 5.6.17, an Inuk shall have the right to harvest that stock or population in the Nunavut Settlement Area up to the full level of his or her economic, social, and cultural needs, subject to the terms of this Article.

For the purpose of Section 5.6.1, full level of needs means full level of harvest.

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<sup>99</sup>. NLCA, *supra* note 11, art 5.

<sup>100</sup>. *Ibid*, pt 5.2.33.

<sup>101</sup>. *Ibid*.

<sup>102</sup>. *Ibid*, pt 5.3.33.

<sup>103</sup>. *Ibid*, pt 5.3.4 [emphasis added].

<sup>104</sup>. *Ibid*.

Where a total allowable harvest for a stock or population of wildlife has been established by the NWMB pursuant to Sections 5.6.16 to 5.6.18, an Inuk shall have the right to harvest that species in accordance with the terms of this Article.

Any restriction or quota on the amount of wildlife that may be harvested that is in force immediately prior to the date of ratification of the Agreement shall be deemed to have been established by the NWMB, and shall remain in effect until removed or otherwise modified by the Board in accordance with this Article.<sup>105</sup>

These provisions provide that, as a matter of fact and without the need for further evidence, it should be presumed that Inuit need the TAH established by the NWMB in respect of polar bears.<sup>106</sup> Additionally, restrictions are placed on who may harvest polar bears.<sup>107</sup>

Finally, as discussed earlier, 5.6.16 is crucial to the analysis of the issues presented in this paper: “Subject to the terms of this Article, the NWMB *shall have sole authority* to establish, modify or remove, from time to time and as circumstances require, levels of total allowable harvest or harvesting in the Nunavut Settlement Area.”<sup>108</sup> This provision is crucial because, like the NILCA, it provides that the NWMB shall have the “*sole authority* to establish, modify or remove, from time to time and as circumstances require, levels of total allowable harvest or harvesting *in the Nunavut Settlement Area.*”<sup>109</sup> In other words, only the NWMB can set the TAH for polar bears *in the NSA*. The same question arises, however, in this context as it did in the NILCA context: if the NSA is a part of the Foxe Basin, and a part of the NSA also exists as the NMR and Nunavik, does that mean the NMRWB is stripped of jurisdiction to make decisions with respect to those mutual settlement areas? Or that the NWMB can make decisions affecting only those parts of the NSA that are also part of the NMR?

These questions are perhaps best answered by a court of law; however, guessing how a court would likely answer them, it is likely that the court would answer them in the negative.<sup>110</sup> In other words, the answer to these questions is likely to be no. Article 40 of the NLCA crystallizes the reasons for answering thusly.

## 2. Article 40

Article 40 of the NLCA fulfills a similar role or functions as does Article 27 in the NILCA. Article 40 governs Nunavut’s relationship with other Aboriginal peoples. Agreements between Nunavut Inuit and other Aboriginal peoples, however, require the consent of the Government of Nunavut or the Government of Canada, as the case may be.<sup>111</sup>

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<sup>105</sup> *Ibid*, pts 5.6.1–5.6.4 [emphasis added].

<sup>106</sup> *Ibid*, art 5.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*, pt 5.6.16 [emphasis added].

<sup>109</sup> *Ibid*.

<sup>110</sup> See generally Julie Jai, “The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference” (2009) 26 NJCL 25.

<sup>111</sup> NLCA, *supra* note 11, art 40.

Article 40, Part 2, dealing with the Inuit of Northern Quebec, is most relevant in the present context. Part 40.2.1 states the objects of the Part, which is identical to article 27 of the NILCA. It deals with “areas of equal use and occupancy”<sup>112</sup> and states the following:

The objects of this Part are as follows:

- a. to provide for the continuation of harvesting by each Group in areas traditionally used and occupied by it, *regardless of land claims agreement boundaries*;
- b. to identify *areas of equal use and occupancy* between the Two Groups and with respect to such areas, to provide for:
  - i. joint ownership of lands by the Two Groups;
  - ii. sharing of wildlife and certain other benefits by the Two Groups;
  - iii. *participation by the Two Groups in regimes for wildlife management*, land use planning, impact assessment and water management in such areas; and
- c. *to promote cooperation and good relations between the Two Groups and among the Two Groups and Government.*<sup>113</sup>

Interestingly enough, but unsurprisingly enough as well, Part 40.2.4 of the NLCA is identical to 27.3.1 found in the NILCA.<sup>114</sup> Part 40.2.4 states:

Subject to Sections 40.2.5 and 40.2.6, the Inuit of Northern Quebec *have the same rights respecting the harvesting of wildlife in the marine areas and islands of the Nunavut Settlement Area traditionally used and occupied by them as the Inuit of Nunavut under Article 5* except they do not have the rights under Parts 2, 4 and 5, Sections 5.6.18 and 5.6.39, Part 8 and Sections 5.9.2 and 5.9.3.<sup>115</sup>

Article 40 of the NLCA has similar provisions with respect to basic and adjusted basic needs levels,<sup>116</sup> as well as similar provisions in respect of areas of equal use and occupancy in terms of other benefits.<sup>117</sup> These remain relevant as the TAH or TAT is adjusted, as the case may be.

Part 40.2.16, included in the section governing “Areas of Equal Use and Occupancy: Management,” provides standing to Makivik<sup>118</sup> to make representations to NWMB “respecting

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<sup>112</sup>. *Ibid*, pt 40.2.2 (“Areas of Equal Use and Occupancy” means those areas described in Schedule 40-1 and shown for general information purposes only on the map appended thereto....”).

<sup>113</sup>. *Ibid*, pt 40.2.1 [emphasis added].

<sup>114</sup>. *Ibid*, art 27.3.1.

<sup>115</sup>. *Ibid*, pt 40.2.4 [emphasis added].

<sup>116</sup>. *Ibid*, art 40.

<sup>117</sup>. *Ibid*, pt 40.2.12.

<sup>118</sup>. The Makivik Corporation is the legal representative of Quebec’s Inuit people, established in 1978 under the terms of the *James Bay and Northern Quebec Agreement*, the agreement that established the institutions of Nunavik. See <<http://www.makivik.org/>>.

the interests of the Inuit of Northern Quebec” and not only obligates *but mandates* the NWMB (and other boards) to “take those representations into account.”<sup>119</sup>

As does the NILCA, the NLCA has provisions governing the Mutual Protection of Rights and Interests, between the Two Groups,<sup>120</sup> the most significant of which in the present context is part 40.2.19, which states:

Each Group *shall consult with the other* with respect to all issues concerning all aspects of harvesting or resource management over which the Group has control or influence and which may affect the other Group. The *obligation to consult* shall include the obligation to give timely written notice and to facilitate in the making of adequate written representations.<sup>121</sup>

Section 40.2.19 provides the clearest articulation of the duty to consult incumbent upon the NWMB and the NMRWB. Increasing or decreasing the TAH of the Foxe Basin polar bear subpopulation is an issue concerning an aspect of harvesting over which NWMB and Nunavut Inuit have control or influence over and which may affect the NMRWB and Nunavik Inuit. Furthermore, the NWMB and Nunavut Inuit have to give timely written notice to NMRWB and Nunavik Inuit and must be given sufficient notice to prepare written representations. Although the NILCA and NLCA and other agreements discussed above on their own create a separate and unique statutory to consult beneficiary groups in overlapping land claims, the Nunavut *Wildlife Act* does the similar—notwithstanding, it does not have the same constitutional status as the NILCA and NLCA do under Section 35 of the *Constitution Act, 1982*.<sup>122</sup>

### III NUNAVUT WILDLIFE ACT

The Nunavut *Wildlife Act* (NWA) is the final piece in this complex legal puzzle; however, as a statute, it is trumped not only by the Constitution of Canada, but also the NLCA because of its constitutional status as a treaty.<sup>123</sup> The NWA contains similar provisions as found in the NILCA and the NLCA; for example, subsections 12(1) and (2) state, respectively, the following:

Pursuant to the Agreement, an Inuk of Northern Quebec with the proper identification may harvest wildlife within those marine areas and islands of the Nunavut Settlement Area traditionally used and occupied by the Inuit of Northern Quebec.

The right to harvest of an Inuk of Northern Quebec under subsection (1) may be exercised without any form of licence or the imposition of any

<sup>119</sup> NLCA, *supra* note 11, pt 40.2.16. The NWMB, NPC, NIRB, and NWB, in performing their functions in relation to islands and marine areas of the Nunavut Settlement Area traditionally used and occupied by the Inuit of Northern Quebec shall allow full standing to Makivik to make representations respecting the interests of the Inuit of Northern Quebec and shall take those representations into account.

<sup>120</sup> *Ibid*, pt 40.2.17.

<sup>121</sup> *Ibid*, pt 40.2.19 [emphasis added].

<sup>122</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>123</sup> *Wildlife Act*, S.Nu. 2003, c 26 s 5 [NWA].

form of tax or fee, if a total allowable harvest for a stock or population of wildlife is established and the harvesting does not exceed his or her adjusted basic needs level.

Certain rules attach to an Inuk harvesting wildlife in Nunavut.<sup>124</sup> Section 120 provides additional statutory jurisdiction—as opposed to purely *constitutional* jurisdiction—by which the NWMB may establish and modify the TAH of a given species or wildlife. Section 120 provides that, pursuant to the NLCA, the NWMB may “establish, modify or remove, from time to time and as circumstances require, levels of total allowable harvest or harvesting” and “ascertain and adjust the basic needs level for Inuit harvesters and harvesters exercising their rights to harvest”.<sup>125</sup> Section 120 also provides that the NWMB may state the TAH in any method it considers appropriate. Finally, Section 120 also provides that, pursuant to the NLCA:

the basic needs level constitutes the first demand on the total allowable harvest; where the total allowable harvest is equal to or less than the basic needs level, Inuit have the right to the entire total allowable harvest; and, where the basic needs levels for Inuit harvesters and harvesters exercising their rights to harvest ... exceed the total allowable harvest, the total allowable harvest shall be allocated among them so as to reflect the ratio of their basic needs levels.<sup>126</sup>

We have seen that similar provisions to those found in subsections 120 of the NWA also exist in NILCA.

Subsection 151(1) reiterates the NLCA’s establishment of NWMB as the “main instrument of wildlife management in the Nunavut Settlement Area.”<sup>127</sup> However, subsection 151(2), in accordance with and in language identical to the NLCA, identifies government as ultimately being responsible for the management of wildlife:

Pursuant to the Agreement, which recognizes that the Government of Nunavut retains ultimate responsibility for wildlife management, the NWMB is the main instrument of wildlife management in the Nunavut Settlement Area, the main regulator of access to wildlife and has the primary responsibility in relation thereto in the manner described in the Agreement.<sup>128</sup>

Subsection 152(1)(a) reiterates that the NWMB (and the Government of Nunavut) is responsible for “establishing, modifying or removing levels of total allowable harvest for a stock or population of wildlife.”<sup>129</sup>

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<sup>124.</sup> *Ibid*, ss 16-18.

<sup>125.</sup> *Ibid*, s 120.

<sup>126.</sup> *Ibid*.

<sup>127.</sup> *Ibid*, s 151(1). The NWMB was established by the Agreement as an institution of public government with responsibilities for wildlife and habitat under the Agreement.

<sup>128.</sup> *Ibid*, s 151.

<sup>129.</sup> *Ibid*, s 152(1) (“Pursuant to the Agreement, the NWMB is responsible for performing the following functions within the Nunavut Settlement Area: (a) establishing, modifying or removing levels of total allowable harvest for a stock or population of wildlife....”).

Section 154 of the NWA is crucial, once again, to understanding the duty to consult incumbent upon beneficiaries, ministers, and governments.<sup>130</sup> Section 154 states:

Notwithstanding subsection 152(4), if a land claim agreement, *other than the Nunavut Land Claims Agreement*, establishes a wildlife management board with responsibilities similar to the NWMB in an area of Nunavut outside the Nunavut Settlement Area, *that board shall be considered as having the same powers, duties and functions as the NWMB under this Act*, with such modifications as the circumstances require, in respect of those matters coming within its jurisdiction.<sup>131</sup>

For the purposes of the NWA, Section 154 of the NWA essentially places the NMRWB at the same jurisdictional level as the NWMB. That being the case, both the NMRWB and the NWMB are capable of exercising jurisdiction with respect to wildlife in the NMR and NSA—or, collectively, the Foxe Basin. Stated another way, and alluding to an analogy from Canada’s early constitutional jurisprudence, the NILCA and NLCA simply do not contain “watertight compartments.”<sup>132</sup> In other words, both agreements contemplated jurisdictional overlap and not jurisdictional exclusivity.

Subsection 156 deals with decisions made by the NWMB and states:

156. (1) Pursuant to the Agreement, every decision of the NWMB is subject to acceptance, rejection, variation or disallowance by the Minister or the Commissioner in Executive Council, as the case may be, in accordance with Sections 5.3.8 to 5.3.15 of the Agreement, except a decision to

- a. establish the qualifications for big game guides;
- b. set trophy fees;
- c. approve access to Inuit owned lands by personnel of the Government of Nunavut for the purpose of wildlife management and research; and
- d. any other decision outside the application of Section 5.3.7 of the Agreement.<sup>133</sup>

Subsection 156(1) raises the interesting question of whether in varying a decision, the common law duty to consult would in the form of the “consult to modify process” would be triggered upon the minister. In other words, the question arises as to whether the common law duty to consult with Nunavut Inuit is triggered when and if the minister decides to vary

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<sup>130</sup> Here again we must ask if these respective wildlife management boards would owe a duty to consult one another.

<sup>131</sup> NWA, *supra* note 123, s 154 [emphasis added].

<sup>132</sup> “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure,” wrote Lord Atkin of the JCPC in *Canada (AG) v Ontario (AG)* [1937] UKPC 6, [1937] AC 326.

<sup>133</sup> NWA, *supra* note 123, s 156(1)

or reject a decision made by the NWMB. This is an example of how the common law duty to consult in relation to administrative tribunals is “murky.”<sup>134</sup>

Subsection 156(2) grants the NWMB the power to hold hearings on any matter within its jurisdiction<sup>135</sup> and subsection 156(3) provides the criteria which the NWMB and the minister must consider when restricting Inuit rights (meaning both Nunavik and Nunavut Inuit rights) to harvest in the NSA.<sup>136</sup>

As we have seen, restrictions on the harvesting of wildlife, for example, polar bears in the Foxe Basin, must accord with the provisions of Articles 5 and 40 of the NLCA. Subsections 156(4)-(6) of the NWA add criteria regarding decisions as to needs, conservation, and distinctions between Inuit and non-Inuit harvesters.<sup>137</sup>

Subsection 156(7), once again places an onus on the NWMB to consider harvesting activities which occur *outside of the NSA* (i.e., the NMR and the Foxe Basin) when making rules or performing its functions in respect of harvesting activities generally:

Pursuant to the Agreement, the NWMB and Minister in exercising their responsibilities in relation to the harvesting of wildlife shall take account of

- a. harvesting activities *outside the Nunavut Settlement Area*; and
- b. the terms of domestic inter-jurisdictional agreements or international agreements pertaining to such wildlife.<sup>138</sup>

Section 157 is devoted to provisions regarding the implementation of accepted decisions of the NWMB. Subsection 157(1) states:

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<sup>134</sup>. McClurg, *supra* note 5 at 79 (“While there is confusion over the extent to which administrative and regulatory bodies are bound to the constitutional duty to consult, the interaction of the constitutional duty to consult and the Nunavut Wildlife Management Board (NWMB) is even murkier. The NWMB is a unique body which is difficult to slot in to any established category of governance and is difficult to analogize with other regulatory or administrative bodies. As Graham White has observed, ‘Aboriginal co-management boards like the NWMB do not constitute a form of Aboriginal self-government, but neither are they part of the federal or territorial governments.’”).

<sup>135</sup>. NWA, *supra* note 123, s 156(2) (“Pursuant to the Agreement, the NWMB may hold public hearings into any issue requiring a decision on its part.”).

<sup>136</sup>. *Ibid* (“Pursuant to the Agreement, decisions of the NWMB or the Minister made in relation to harvesting wildlife within the Nunavut Settlement Area shall restrict or limit Inuit harvesting only to the extent necessary a) to effect a valid conservation purpose; b) to give effect to the allocation system outlined in Article 5 of the Agreement; c) to give effect to other provisions of Article 5 of the Agreement; d) to give effect to the provisions of Article 40 of the Agreement; or e) to provide for public health or public safety.”).

<sup>137</sup>. *Ibid*, s 156(4)–(6) (“Pursuant to the Agreement, where a decision of the NWMB is made in relation to a presumption as to needs, adjusted basic needs level or Section 5.6.39 of the Agreement, the Minister may reject or disallow that decision only if the Minister determines that the decision is not supported by or consistent with the evidence that was before the NWMB or available to it.... Pursuant to the Agreement, when making decisions affecting critical habitats, wildlife sanctuaries, special management areas and parks within the Nunavut Settlement Area, the NWMB and the Minister shall take into account the special purposes and policies relating to those areas.... Pursuant to the Agreement, the NWMB may distinguish between Inuit harvesters and other harvesters in establishing or removing non-quota limitations, but non-quota limitations for Inuit harvesters shall not be more severe than limitations for other harvesters.”).

<sup>138</sup>. *Ibid*, s 156(7) [emphasis added].

Pursuant to the Agreement, the Minister shall proceed forthwith to do all things necessary to implement any decision of the NWMB, within its responsibilities under the Agreement or this Act, that

- a. is accepted by the Minister, with any variation he or she may have made in accordance with Section 5.3.10 of the Agreement;
- b. is not disallowed by the Minister in accordance with Section 5.3.11 of the Agreement; or
- c. is accepted by the Commissioner in Executive Council, with any variation it may have made, in accordance with Section 5.3.15 of the Agreement.<sup>139</sup>

Subsection 157(2) states when a decision takes effect:

A decision of the NWMB in relation to matters relevant to this Act takes effect when it is implemented by the Government of Nunavut in accordance with this Act.<sup>140</sup>

Subsection 157(3), however, provides that the minister is *not* responsible for implementing a decision outside of the NSA or the territory of Nunavut—in this case the NMR or Nunavik:

For greater certainty, the Minister is not responsible for implementing any decision of the NWMB that is outside the responsibility or authority of the NWMB or outside the jurisdiction of the Government of Nunavut.<sup>141</sup>

That government is not responsible for implementing any decision of the NWMB that is outside the responsibility or authority of the NWMB or outside the jurisdiction of the government makes sense, at least in the case of the Government of Nunavut, because it simply does not have the jurisdiction to do so anyway.

Finally, Section 200 provides to the Commissioner of Nunavut the power to exempt persons from the NWA as well as implementing, potentially, under Section 200(c), NMRWB decisions:

The Commissioner in Executive Council may make regulations respecting the recognition and implementation of the Agreement or any other land claims agreement, including

- a. exempting of any area or region of Nunavut or a class or group of persons to which the agreement applies from any provision of this Act or the regulations;
- b. adopting or implementing decisions of the NWMB;
- c. *adopting or implementing decisions made by any other body given decision making power in respect of wildlife or habitat management under the agreement; and*

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<sup>139</sup>. *Ibid*, s 157(1).

<sup>140</sup>. *Ibid*, s 157(2).

<sup>141</sup>. *Ibid*, ss 157(3).

- d. prescribing quotas, determined in accordance with the agreement, for wildlife.<sup>142</sup>

What an analysis of these land claim agreements and the NWA illustrate, is a complex intertwined duty of consultation placed on various beneficiaries of these agreements to consult one another.

### III THE COMMON LAW DUTY TO CONSULT

The common law duty to consult Aboriginal peoples affected by a government action or decision that may affect an Aboriginal or treaty right is a well-established but continually developing principle in Canadian law. Although multi-dimensional, the essence of the duty to consult, simply stated, is that the Crown in right of a province or in right of Canada—or “the Crown”—must consult Aboriginal peoples whose Aboriginal or treaty rights or interests could be affected by the decision that government is planning or intends to make, and must accommodate those rights and interests depending on the strength of the claim asserted by the affected Aboriginal group and harm that will be suffered if not properly and sufficiently accommodated by government.<sup>143</sup>

Like other public governments in Canada, the Government of Canada’s “duty to consult and accommodate arises from its obligation to deal honourably with Aboriginal people. The duty extends not only to the process of treaty making,” the Nunavut Court of Justice held, “*but also of treaty interpretation. The duty to consult and accommodate does not come to an end when a treaty is settled.*”<sup>144</sup> The common law duty to consult Inuit in Nunavut is, according to the Nunavut Court of Justice, incumbent on the Government of Canada following the conclusion of a treaty.<sup>145</sup> The holding this decision by the Nunavut Court of Justice mirrors the holding in *Little Salmon/Carmacks First Nation*.

In *Little Salmon/Carmacks First Nation* – the case that addressed the duty to consult with respect to modern treaty interpretation – the Supreme Court of Canada held that:

When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties’ respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process

<sup>142</sup>. *Ibid*, s 200.

<sup>143</sup>. *Haida Nation*, *supra* note 2.

<sup>144</sup>. *Qikiqtani Inuit Assn*, *supra* note 6 at para 19 (“[T]he duty to consult will arise when the Crown has knowledge of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it.... The government’s duty to consult and accommodate arises from its obligation to deal honourably with Aboriginal people. The duty extends not only to the process of treaty making, *but also of treaty interpretation. The duty to consult and accommodate does not come to an end when a treaty is settled.*” [emphasis added]) [emphasis added].

<sup>145</sup>. *Ibid* at para 29 (“The court is cognizant that the government’s duty to consult and accommodate does not mean there is a duty to reach agreement. There may be times when the parties, despite extensive consultation, cannot agree on a final resolution. There is no [A]boriginal veto on government decisions. There may be times when the parties disagree on whether the government has met its obligation to consult and accommodate and the government will be found to have discharged its obligation. The court must ensure that allegations of a failure to consult are not used to simply derail government projects that the Aboriginal group opposes. I am satisfied that this is not such a case.”).

of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.... The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties....<sup>146</sup>

By the holding of *Little Salmon/Carmacks First Nation* and *Qikiqtani Inuit Assn. v Canada*, as held by the Nunavut Court of Justice, we see that although the duty to consult would, in any event, be extant on the government and others at common law, the first step of the *Little Salmon* test is partly satisfied by some of the land claims agreements examined above in the sense that there is some form of consultation provided for in the treaties themselves. But what *Little Salmon/Carmacks First Nation* does not illustrate for us is the separate and unique constitutional duty to consult that these land claims agreements placed on beneficiaries of the agreements themselves.

The rights to hunt and harvest wildlife such as polar bears in the Foxe Basin are treaty rights which are enumerated in the various land claims agreements discussed above, and which are most certainly Aboriginal and treaty rights of the Inuit of Nunavut, Nunavik, Labrador, James Bay, and the Eeyou Istchee Crees. These Aboriginal and treaty rights are constitutionally protected. Given their importance to these Aboriginal peoples, the right to hunt and harvest wildlife would thus fall on the high end of the *Haida Nation* spectrum. We are, nevertheless, again left with the general question as to how, exactly, the common law duty to consult operates in jurisdictions such as these.

Although there is no Crown in right of Nunavut, for example, an argument can be made that despite the existence of the separate and unique constitutional duty to consult extant on beneficiaries, as a public government, the Government of Canada (and of Nunavut) is still bound by a common law duty to consult *other* Aboriginal interests that might be affected by a decision to increase or decrease the TAH in the Foxe Basin subpopulation. While the fulfillment of the duty to consult cannot be discharged by the NWMB, the Supreme Court of Canada tells us, because it is, in essence, an administrative tribunal, the reality is that the very process by which decisions are made by the beneficiaries of agreements discussed in this paper, and their wildlife boards, respecting wildlife harvesting is a *consultative* and *accommodative* one.

Part 5.37 of the NLCA deals with the “Legal Effect of Decisions (Territorial Government Jurisdiction),” namely the Government of Nunavut, and states the following: “All decisions made by the NWMB in relation to Subsection 5.2.34(a), (c), (d) or (f) or any of Parts 4 to 6 or Article 40 and subject to *territorial government jurisdiction* shall be made in the manner set out in Sections 5.3.8. to 5.3.15.”<sup>147</sup> When we look at Sections 5.3.8 to 5.13.15 we see the following:

When the NWMB makes a decision, it shall forward that decision to the Minister. The NWMB shall not make that decision public.

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<sup>146</sup>. *Little Salmon/Carmacks First Nation*, *supra* note 2 at paras 61, 67.

<sup>147</sup>. NLCA, *supra* note 11, pt 5.3.7. [emphasis added].

After receiving a decision of the NWMB pursuant to Section 5.3.8, the Minister may:

- a. accept the decision; or
- b. disallow the decision in accordance with Section 5.3.11.

Where the Minister accepts a decision of the NWMB or does not disallow that decision in accordance with Section 5.3.11, the Minister shall proceed forthwith to do all things necessary to implement that decision.

Where the Minister decides to disallow a decision of the NWMB:

- a. the Minister must do so within 30 days of the date upon which the Minister received the decision or within such further period as may be agreed upon by the Minister and the NWMB; and
- b. the Minister shall give the NWMB reasons in writing for deciding to disallow the decision.

Where the Minister disallows a decision of the NWMB pursuant to Section 5.3.11, the NWMB shall reconsider the decision in the light of the written reasons provided by the Minister and make a final decision, which it shall forward to the Minister. The NWMB may make that final decision public.

Subject to Section 5.3.14, after receiving a final decision of the Board made pursuant to Section 5.3.12, the Minister may:

- a. accept the final decision;
- b. disallow the final decision; or
- c. vary the final decision.

Where a final decision of the NWMB is made in relation to a presumption as to needs, adjusted basic needs level or Section 5.6.39 and the Minister disallows the final decision, the Minister shall refer the final decision to the Commissioner in Executive Council, who may:

- a. accept the final decision;
- b. reject the final decision; or
- c. vary the final decision.

Where a final decision has been received by the Minister pursuant to Section 5.3.12 and the Minister or, where applicable, the Commissioner-in-Executive Council, decides to accept or vary the final decision, the Minister shall proceed forthwith to do all things necessary to implement the final decision or the final decision as varied.<sup>148</sup>

As noted earlier, the interesting question arises of whether in varying a decision, the common law duty to consult would, in the form of the “consult to modify process,” be triggered by or upon the minister. In other words, the question arises as to whether the common law duty to consult with both Nunavut and Nunavik Inuit is triggered when and if the Minister decides to vary or reject a decision made by the NWMB. The answer to this

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<sup>148</sup>. *Ibid*, ss 5.3.8–5.13.15.

question is, at best, unclear.<sup>149</sup> Similar provisions as these governing the legal effect of decisions made within the Government of Canada's jurisdiction also exist within the NLCA.<sup>150</sup>

At a minimum, what can be safely concluded, despite the lack of clarity respecting the common law duty to consult in this context, is that all the beneficiaries discussed in these agreements are, in some form or fashion, owed a duty of consultation by virtue of their respective land claim agreements at least, and in some cases also by the common law.

## IV CONCLUSION

The discussion in this paper has been largely descriptive and somewhat theoretical. While one author has argued that the common law consultation duty, even if it is not incumbent upon the NWMB at law, *per se*, should at least be operationalized by NWMB,<sup>151</sup> the real answers to the questions I have raised here will be given in the jurisprudence when and if some of these provisions respecting the harvesting of wildlife are tested in the courts through litigation. Nevertheless, I have attempted to illustrate in this paper, by examining shared jurisdiction over the Foxe Basin polar bear subpopulation, what I have described as a "separate and unique constitutional duty to consult" one another that is extant on the beneficiaries-signatories in agreements with overlapping land settlement areas and the wildlife that is harvested by them within those settlement areas. While the extent to which the beneficiaries of the various agreements examined in this paper are required to consult with one another has been sufficiently mapped here, less can be said of the common law duty to consult as it relates to government. But this was not my aim in this paper. Questions of how the common law duty to consult is to be discharged by governments in jurisdictions such as these is best left for detailed and more eloquent discussion elsewhere.

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<sup>149</sup> See McClurg, *supra* note 5 at 93–94 ("Looking strictly at the provisions of the land claims agreement, it would appear at this stage that the Minister has absolute discretion over the proposal, particularly because of the Minister's ability to vary the recommendations. However the decision to reject or vary the recommendations of the NWMB is a very serious one. In order to obtain a sense of the significance of such a decision, it is worth considering that the land claims agreement articulates that one of the NWMB's functions is to 'approve plans for management of... wildlife.' Additionally, the land claims agreement uses the term 'final decision' to characterize the NWMB's recommendations to the Minister. These terms reflect the NWMB's role as 'the main instrument of wildlife management in the Nunavut Settlement Area,' and as the "main regulator of access to wildlife.' Thus, while legally the Minister appears to be free to do as he/she pleases with the recommendations of the NWMB, the practical reality is quite different. In practical terms the Minister is quite confined by the political optics of making policy in spite of the recommendations of the NWMB, and by the consequent threat of judicial review of such decisions. As Graham White notes in his assessment of territorial co-management boards, the boards represent a reverse of the 'usual political calculus.' He observes that whereas, generally, advisory boards must expend political capital in the hopes that their recommendations will be taken in to account, the government in this case must expend enormous political resources in order to reject or modify the board's recommendations. In White's first-hand research with several members of a northern co-management board that he chose not to name, the members noted that 'in practice, rejection or modification of a decision [of the board] carries with it a high political risk...' While this is not a hard and fast rule and there have been instances in which the Minister has rejected the NWMB's suggestions, generally speaking, Ministerial rejection of NWMB recommendations entails risks." [footnotes removed]).

<sup>150</sup> NLCA, *supra* note 11.

<sup>151</sup> McClurg, *supra* note 5.

What I have also aimed to illustrate in this paper is that little attention has been paid, up to this point, as to what the content of the separate unique and constitutional duty to consult I have identified consists of. That is the contribution this paper hopes to make to the literature respecting these issues. While the NLCA does *not* provide a definition of “consult” or “consultation,” the NILCA and several of the other agreements discussed in this paper *do*. If that definition were extended to all of the agreements discussed here, the separate and unique constitutional duty to consult extant on the beneficiaries who signed the agreements, would also be extant on administrative tribunals and governments and could be characterized as follows: the provision, by NWMB, to NILCA, JBQNA, and Eeyou beneficiaries (the NMRWB, the Coordinating Committee, and the EMRWB), of notice of the matter to be decided, in sufficient form and detail to allow them to effectively assess the matter and to prepare advice on the matter; the provision of a reasonable period of time in which these beneficiaries/bodies may prepare their advice on the matter, and provision of an opportunity to present such advice to the NWMB; full and fair consideration by the NWMB on any advice presented; and the immediate provision of written reasons by NWMB for any advice that is rejected or varied.<sup>152</sup> These provisions mirror the basic tenets of procedural fairness in administrative law jurisprudence.

Specifically, as was discussed earlier, the Nunavut Inuit and Nunavik Inuit shall consult with each other in respect “to all issues concerning all aspects of harvesting or resource management over which the Group has control or influence and which may affect the other Group. The obligation to consult shall include the obligation to give timely written notice and to facilitate in the making of adequate written representations.”<sup>153</sup> Again, this separate and unique duty to consult that I write about mirrors the basic tenets of procedural fairness in administrative law. If Justice Binnie’s words in *Little Salmon/Carmacks First Nation*—that:

[a] treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract [because it] is as much about building relationships as it is about the settlement of ancient grievances ... [and] designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests.<sup>154</sup>

—are to hold true, then the separate and unique constitutional duty to consult I have discussed in this paper, though raising more questions than providing answers, nonetheless provides a suitable framework in which to comprehend and address, among these beneficiaries of these agreements, the duty to consult in respect of wildlife harvesting in land claims agreements that have overlapping settlement land areas.

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<sup>152</sup> See NLCA, *supra* note 11, art 1. See also Eeyou Agreement, *supra* note 10..

<sup>153</sup> NILCA, *supra* note 9, pt 27.7.3 (“Each Group shall consult with the other with respect to all issues concerning all aspects of harvesting or resource management over which the Group has control or influence and which may affect the other Group. The obligation to consult shall include the obligation to give timely written notice and to facilitate in the making of adequate written representations.”).

<sup>154</sup> *Little Salmon/Carmacks First Nation*, *supra* note 2 at para 10.